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IN THE SUPREME COURT OF THE UNITED STATES

WHOLE WOMAN'S HEALTH, et. al.,

PETITIONERS

v.

JOHN HELLERSTEDT, M.D., et. al.

RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICI CURIAE OPERATION RESCUE AND NATIONAL HISPANIC CHRISTIAN LEADERSHIP CONFERENCE/CONELA IN SUPPORT OF RESPONDENTS SEEKING AFFIRMANCE

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INTEREST OF AMICI[1]

Operation Rescue is a leading pro-life advocacy organization that has worked for decades to uncover abortion clinic wrong-doing, expose it to the public, and bring the offenders to justice. Operation Rescue has developed peaceful, legal strategies for investigating abortion clinics and reporting unsafe conditions and illegal activities. Among those strategies are undercover investigations, such as one conducted in Texas, which helped prompt the legislative investigation leading to the adoption of the ambulatory surgical center and physician admitting privileges standards in HB2. Operation Rescue's work helped uncover some deplorable conditions at various Texas abortion clinics which threatened the health and welfare of pregnant women and their families.

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[1] Counsel for a party did not author this Brief in whole or in part, and no such counsel or party made a monetary contribution to fund the preparation or submission of this Brief. No person or entity, other than *Amici Curiae* or their counsel made a monetary contribution to the preparation and submission of this Brief. Petitioners and Respondents have consented to the filing of this Brief and written consents are being filed simultaneously with the Brief.

As a result of its investigation, Operation Rescue has obtained extensive evidence of unsafe and unsanitary conditions in Texas abortion clinics, evidence that is of critical importance to this Court's consideration of Petitioners' challenges. Operation Rescue's findings, which are presented in this Brief, point to the compelling need for the regulations enacted by the Texas Legislature in HB2.

The National Hispanic Christian Leadership Conference ("NHCLC") is America's largest Hispanic Christian evangelical organization. NHCLC was founded in 1995 and, on May 1, 2014, merged with Conela, a Latin America-based organization, to become NHCLC/Conela, representing more than 500,000 churches throughout the world. Among the seven directives that guide NHCLC/Conela is a directive focused on the sanctity of human life. Under that directive, NHCLC/Conela members pledge to work to bring assistance, comfort, and care to pregnant women in need and to those who have undergone abortion. NHCLC/Conela members are deeply concerned about the medical care available to pregnant women and the unsafe conditions that were present in Texas prior to the passage of HB2. NHCLC/Conela members have witnessed the devastating effects that substandard medical care has had on pregnant women, and in particular on Hispanic women, and therefore urge this Court to uphold HB 2.

Based upon the foregoing and with the consent of the parties, Amici respectfully submit this Brief for the Court's consideration.

INTRODUCTION

With the enactment of HB2, pregnant women in Texas no longer have to worry about whether they will receive the same standard of care for elective abortions as do their fellow Texans seeking other outpatient surgical procedures. Texas enacted HB2 as part of its "legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient." *Roe v. Wade*, 410 U.S. 113, 150 (1973). Indeed, as Petitioners' counsel acknowledge, women are threatened when abortion is conducted by "unqualified people in unhygienic conditions." [2]

Operation Rescue's investigation found that many pregnant women in Texas were under just such a threat as they sought elective abortions at clinics which did not meet the standards of ambulatory surgical centers, and which were overseen by physicians who did not

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[2] Center for Reproductive Rights, Briefing Paper: *Safe Abortion: A Public Health Imperative*, 1 (September 2005), http://www.reproductiverights.org/sites/default/files/documents/pub_bp_tk_safe_abortion.pdf.

have admitting privileges at nearby hospitals.[3] Operation Rescue demonstrated that the "back alley" abortions that abortion advocates promised would diminish with the legalization of the procedure[4] were still very much alive in some regions of Texas.

When presented with Operation Rescue's evidence and further evidence from physicians and others who care for pregnant women, the Texas Legislature enacted HB2 to "increase the health and safety of a woman who chooses to have an abortion" by requiring that abortion clinics conform to the same standards of care as do ambulatory surgical centers.[5] Petitioners, abortion providers and organizations advocating for abortion rights as a means of safeguarding women's health, immediately challenged the health-protective regulations.

According to Petitioners, requiring that abortion clinics meet minimum standards of care for surgery centers, and thereby assuring

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3 *See infra*, Section II.

4 *See e.g.*, NARAL Pro-Choice America, *Roe v. Wade and the Right to Choose*, January 1, 2015, http://www.prochoiceamerica.org/media/fact-sheets/government-federal-courts-scotus-roe.pdf.

5 Senate Research Center, Bill Analysis HB2, Author/Sponsor's Statement of Intent, p. 1, July 11, 2013, http://www.legis.state.tx.us/tlodocs/832/analysis/html/HB00002E.htm.

pregnant women that they are entitled to the same safe and sanitary facilities as are other Texans, is too costly a burden to bear. (Petitioners' Opening Brief, pp. 6-7). It is not worth investing money to either renovate or build facilities that would ensure that pregnant women have the same level of staffing, same quality of facilities and same amenities as those seeking other outpatient surgery, according to those advocating for "safer" abortions. (*Id.*).

Respondents, Amici, and this Court disagree. No price can be placed upon the health and safety of pregnant women who deserve no less than the same quality of medical care accorded to those who seek routine outpatient surgery. *See Roe*, 410 U.S. at 150. HB 2 provides pregnant women with those assurances and should be upheld by this Court.[6]

LEGAL ARGUMENT

More than 40 years of this Court's precedents, Operation Rescue's investigation of abortion clinics in Texas, and other evidence

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[6] Center for Reproductive Rights, Briefing Paper: *Safe Abortion: A Public Health Imperative,* 1 (September 2005), http://www.reproductiverights.org/sites/default/files/documents/pub_bp_tk_safe_abortion.pdf.

presented to the Legislature demonstrate that HB2 is not merely a legitimate, but a necessary measure to protect the health and safety of pregnant women. The Fifth Circuit properly concluded that Texas enacted HB2 "to provide the highest quality of care to women seeking abortions and to protect the health and welfare of women seeking abortions," and that "[t]here is no question that this is a legitimate purpose that supports regulating physicians and the facilities in which they perform abortions." *Whole Woman's Health v. Cole*, 790 F.3d 563, 584 (5th Cir. 2015).

I. THIS COURT'S ABORTION JURISPRUDENCE ESTABLISHES THAT HB2 IS A PROPER EXERCISE OF TEXAS' COMPELLING STATE INTEREST IN PROTECTING THE HEALTH OF WOMEN SEEKING ABORTION.

From 1973 to today, this Court has established and consistently re-affirmed that states such as Texas have legitimate interests in promoting the health and safety of pregnant women seeking an abortion. These interests encompass both regulations furthering the health and safety of the state's residents, including pregnant women, *Planned Parenthood of SE Pennsylvania v. Casey*, 505

U.S. 833, 846 (1992), and regulations protecting the integrity and ethics of the medical profession. *Gonzales v. Carhart*, 550 U.S. 124, 156 (2007).

Even while finding a "right to choose" abortion in the Constitution, this Court acknowledged the continuing interest of states in protecting the health and safety of pregnant women. *Roe*, 410 U.S. at 150.

> The State has a legitimate interest in seeing to it that *abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient.* This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal 'abortion mills' strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed.

Id. (emphasis added). That is precisely the case here. As discussed *infra*, Operation Rescue's investigation and the testimony of physicians

before the Legislature showed conditions akin to the illegal abortion mills referenced in *Roe*, strengthening the state's interest in regulating the conditions under which abortions are performed through the provisions of HB2.

In the ensuing 43 years after *Roe*, this Court has consistently re-affirmed that the interest of states in protecting the health and safety of their residents extends to pregnant women seeking abortions, upholding regulations such as Missouri's requirements for recordkeeping and confidential reporting. *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 81 (1976). "Recordkeeping of this kind, if not abused or overdone, can be useful to the State's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment." *Id.* "As so regarded, we see no legally significant impact or consequence on the abortion decision or on the physician-patient relationship." *Id.*

Citing *Danforth*, the *Casey* Court upheld similar recordkeeping requirements in Pennsylvania's statute. *Casey*, 503 U.S. at 900-01.

> The collection of information with respect to actual patients is a vital element of medical research, and so it cannot be said that the requirements serve no purpose

> other than to make abortions more difficult. Nor do we find that the requirements impose a substantial obstacle to a woman's choice.

Id. Pennsylvania's informed consent and 24-hour waiting period regulations also served the state's interest in protecting the health of pregnant women without imposing an undue burden on the right to obtain an abortion. *Id.* at 878. This Court reiterated the principle that "*[a]s with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion.*" *Id.* (emphasis added). Regulations designed to foster the health of pregnant women are valid so long as they do not have the purpose or effect of "presenting a substantial obstacle to a woman seeking an abortion or impose an undue burden on the right." *Id.*

Most relevant to this case is the Court's decision upholding Virginia's second trimester ambulatory surgical center requirements in *Simopoulos v. Virginia*, 462 U.S. 506, 517 (1983). Citing to *Roe*'s statement about abortion clinics being held to the same standards as other medical facilities, this Court found that Virginia's requirements conformed to accepted medical practice and did not interfere with the physician-patient relationship or a woman's choice. *Id.* at 519. This Court noted that:

> The medical profession has not thought that a State's standards need be relaxed merely because the facility performs abortions: "Ambulatory care facilities providing abortion services should meet the same standards of care as those recommended for other surgical procedures performed in the physician's office and outpatient clinic or the free-standing and hospital-based ambulatory setting." American College of Obstetricians and Gynecologists (ACOG), Standards for Obstetric-Gynecologic Services 54 (5th ed. 1982).

Id. at 517. "We conclude that Virginia's requirement that second-trimester abortions be performed in licensed clinics is not an unreasonable means of furthering the State's compelling interest in 'protecting the woman's own health and safety *Roe*, 410 U.S., at 150." *Id.* at 519.

Such facilities and physician qualification standards have also been upheld as furthering the state's significant interest in protecting the integrity and ethics of the medical profession. *Carhart*, 550 U.S. at 156 (citing *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997)). "The law need not give abortion doctors unfettered choice

in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Id.* at 163.

Instead, as this Court has held since *Roe*, physicians and clinics providing abortion services should be held to the same standards as are practitioners and clinics performing other medical procedures. *Roe,* 410 U.S. at 150. Pregnant women, like everyone seeking medical care, deserve medical facilities that provide for the maximum safety of the patient. *Id.* That is what Texas is fostering in HB2.

II. THE EVIDENCE BEFORE THE TEXAS LEGISLATURE REVEALED THAT WOMEN SEEKING ABORTIONS WERE SUBJECTED TO THE VERY KIND OF "BACK ALLEY" CONDITIONS THAT LEGALIZING ABORTION WAS SUPPOSED TO REMEDY.

Prior to HB2, pregnant women seeking abortions in Texas, in many cases, were not receiving the same safe and sanitary care as were other patients. Instead, Operation Rescue's investigation revealed that many women were faced with substandard conditions reminiscent of the "back alley" abortions that were supposed to be a thing of the past once this Court legalized abortion in *Roe*.

Operation Rescue's investigation revealed a startlingly different picture of abortion facilities in Texas than that painted by Petitioners, and established the need for the regulations enacted in HB2.

A. Petitioners Offer An Inaccurate, Idyllic Portrait Of Abortion in Texas.

Petitioners claim that HB2's regulations, including the requirement that abortion clinics conform to the standard for ambulatory surgical centers are not only unnecessary, but actually unbeneficial for pregnant women seeking an abortion. (Petitioners' Opening Brief, p. 18). According to Petitioners, "precautions aimed at maintaining a sterile operating environment provide no benefit for abortion procedures." (*Id.* at 18-19). In other words, pregnant women seeking abortions do not benefit from a sterile and spacious operating environment, increased staffing, and heating, ventilation and air conditioning requirements aimed at maintaining a healthy and safe atmosphere. (*Id.* at 6-7). Therefore, according to Petitioners, there is no reason for abortion providers to spend $1.7 to $2.6 million to upgrade their facilities, or $3 million to build new facilities, to provide pregnant women with the same safe and sterile operating

environment enjoyed by other Texans undergoing surgical procedures. (*Id.*). Ensuring the health and safety of pregnant women seeking abortion is not worth an extra $600,000 to $1million in annual operating costs, according to Petitioners. (*Id.*).

Furthermore, Petitioners claim, "the record shows no problem with abortion safety in Texas that would signal a need for heightened regulation." (*Id.* at 42). Instead, the Court is told, "abortion facilities operating under existing standards have a demonstrated record of safety." (*Id.* at 2). Petitioners note that "many common outpatient procedures have complication rates that are comparable to—or higher than—abortion procedures. These include colonoscopy, most cosmetic surgeries, and vasectomy." (*Id.* at 15-16). *In each of those cases, however, the patients receive care in ambulatory surgical centers*, something that Petitioners say pregnant women do not need and cannot benefit from.

B. The Evidence Shows That Petitioners' Portrait Does Not Comport With Reality.

Operation Rescue's investigation and testimony from physicians discussed *infra*, demonstrate that the conditions faced by pregnant women in many Texas abortion clinics prior to HB2 were anything but safe and

sanitary. Instead, Operation Rescue's findings revealed the kind of unsafe and unhygienic conditions that Petitioners have proclaimed to be a threat to women's health.[7]

From December 2010 through February 2011, Operation Rescue conducted an investigation of a dozen randomly selected Texas abortion clinics. Investigators and researchers engaged in undercover telephone calls and visits to the clinics posing as women seeking an abortion. The investigation focused on what the average woman would experience if she sought an abortion in Texas, and how the abortion clinics appeared and operated on an everyday basis.[8] The investigation revealed numerous violations of state and federal laws at each facility visited.

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[7] Center for Reproductive Rights, Briefing Paper: *Safe Abortion: A Public Health Imperative,* 1 (September 2005), http://www.reproductiverights.org/sites/default/files/documents/pub_bp_tk_safe_abortion.pdf.

[8] Operation Rescue, *Special Report: Widespread Abortion Abuses Discovered at Texas Abortion Facilities,* p. 3 (2011), http://www.operationrescue.org/archives/tx-abortion-abuses.

1. Investigators Found Unsafe and Unsanitary Clinic Conditions.

Operation Rescue's investigators found that the abortion clinics were "in various stages of uncleanness and disrepair."[9]

> Bathroom conditions were particularly appalling. Some clinics had one bathroom that was shared by men and women, including post-surgical abortion patients. Bloody smears could be seen on the toilet and other areas of the McAllen Whole Women's Health clinic. Faucets were corroded and leaking. Poor lighting in the waiting and examination areas was the result of numerous burned out bulbs. A leaky roof had damaged the ceiling and created the possibility of an unhealthy mold infestation.[10]

In trash bins outside of the clinics investigators found "human flesh remains from abortion" and "non-flesh abortion procedure waste (blood and suction tubes and syringes),

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9 *Id.* at 7

10 *Id.* at 7-8.

illegally dumped in the trash."[11] In addition, dumpsters contained:

> [L]arge packets of material wrapped in blue paper with labels that noted the date of the abortion and other notations. Inside the packets were bloody tubing, cannulas, and gauze pads wrapped in large blue paper closed with masking tape bearing the date of the abortion. Some of the packets also contained human tissue that appeared to be partial remains of aborted babies left to putrefy in the open dumpster where animals or people could encounter it.[12]

Investigators also found partially used "medication vials of I.V and injectable drugs in the dumpsters mixed with packets containing the bloody refuse from abortions."[13]

> Drugs included injectable versions of the following:
>
> • Lidocaine, a numbing drug that has caused death in abortion patients.

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11 *Id.* at 5

12 *Id.*

13 *Id.* at 6.

> • Methergine, which is applied to the uterus to control bleeding.
>
> • Midazolam, (Versed), a drug that depresses the nervous system.
>
> There was a concern that children or others could have discovered the partially filled drug vials and suffered serious injury if they had ingested any of it.[14]

2. Investigators Found Violations of Patient Privacy.

Investigators also found that the safety and privacy of patients' medical records and samples were not adequately protected. Planned Parenthood, Whole Women's Health and other abortion providers are bound by and purport to follow the medical records privacy provisions of the Health Insurance Portability and Accountability Act of 1996, §264, 42 U.S.C. §§1320d-1320d-9. In particular, health care providers must maintain the integrity and confidentiality of patient information to protect against "any reasonably anticipated threats or

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14 *Id.*

hazards to the security or integrity of the information and unauthorized uses or disclosures of the information." 42 U.S.C. §1320d-2.

Planned Parenthood of Greater Texas acknowledges their responsibilities under HIPAA in their "pledge" to patients:

> The privacy and security provisions of the Health Insurance Portability and Accountability Act ("HIPAA") require us to:
>
> - Make sure that health information that identifies you is kept private;
> - Make available this notice of our legal duties and privacy practices with respect to health information about you; and
> - Follow the terms of the notice that is currently in effect.
>
> We understand that health information about you and your healthcare is personal. We are committed to protecting health information about you. We will create a record of the care and services you receive from us. We do so to provide you with quality care

> and to comply with any legal or regulatory requirements.[15]

Planned Parenthood Federation of America has touted its record of protecting patient privacy, including initiating several lawsuits to prevent the disclosure of patient records.[16] "Planned Parenthood is committed to medical privacy and will do everything in our power to protect our clients' confidential health information....Planned Parenthood's top priorities are the health and safety of our patients; we are committed to protecting teenagers from abuse and we take very seriously our duty to report it."[17]

More particularly, Petitioner Whole Women's Health pledges to patients:

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[15] Planned Parenthood of Greater Texas, Notice of Health Information Privacy Practices, *Our Pledge Regarding Your Health Information*, https://www.plannedparenthood.org/planned-parenthood-greater-texas/hipaa?_ga= 1.257576140.658175188.1453738401.

[16] Planned Parenthood Federation of America, *Court Ruling Protects Patient Privacy*, May 13, 2014, https://www.plannedparenthood.org/about-us/newsroom/press-releases/court-ruling-privacy?_ga=1.7023221.658175188.1453738401

[17] *Id.*

> Whole Woman's Health clinics go to extreme efforts to ensure patient confidentiality. We understand that this is a private healthcare decision between a woman and her healthcare provider. Any and all information obtained by Whole Woman's Health will be kept confidential, unless requested by a patient with a corresponding valid ID and a medical release request.[18]

Such representations undoubtedly would be reassuring to pregnant women seeking abortions, for whom confidentiality and privacy would be of particular concern. As this Court said in *Danforth* and *Casey*, patient privacy and confidentiality must be respected in the abortion context as in every other health care context. *Danforth*, 420 U.S. at 80; *Casey*, 505 U.S. at 900. This is particularly important in situations where disclosure of the information could endanger the pregnant woman's life, such as domestic abuse or child abuse. *Casey*, 505 U.S. at 893-98.

Operation Rescue's investigation demonstrated that any confidence that pregnant women might have placed in the safety of their medical records and medical

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18 http://wholewomanshealth.com/faq.html #confidential

specimens at the hands of certain Texas abortion clinics was misplaced. Investigators found lab specimen cups, ultrasound pictures, lab reports and other materials with patient identifiers "thrown into the trash where everyone can invade their privacy."[19]

> In at least nine cases, full documents were dumped containing such detailed information as patient name, the name of her escort to the abortion clinic, the date of her abortion, weather she was a return patient, the cost of her abortion and how it was being funded, gestational age of her pre-born baby, and the patient's referral source.[20]

Other patient records and personal materials found in the trash included:

- Urine cups with names and birth dates of patients clearly marked;
- Dozens of sonograms with patient identifying information on them, including parental names clearly identifiable;
- Numerous patient charts, receipts, ledgers, and other private

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19 Operation Rescue, *Special Report*, at 5-6.

20 *Id.* at 7

> medical paperwork with full names, birth dates, addresses and phone numbers, financial information, procedure details and more.[21]

Therefore, contrary to the promises made by the abortion providers, and contrary to their obligations under HIPAA, pregnant women in Texas could not be assured that their most private information was protected.

Operation Rescue submitted the evidence collected during the investigation to the Texas Attorney General.[22] In addition, after the release of Operation Rescue's findings, the Texas Department of Environmental Quality investigated Whole Women's Health facilities in McAllen and Austin and found violations of Texas laws related to the disposal of medical waste.[23] The McAllen clinic was assessed a fine

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21 *Id.* at 5.

22 Operation Rescue, *Special Report*, at 12.

23 Operation Rescue, *Over $83,000 in Fines Assessed in Texas for Illegal Dumping of Aborted Baby Remains*, December 1, 2011 http://www.operationrescue.org/archives/over83000infinesassessedintexasforillegaldumpingofabortedbabyremains/, citing Texas Commission of Environmental Quality Docket No. 2011 0954-MSW-E; Enforcement Case No. 41836; Docket No. 2011-0955-MSW-E; Enforcement

of $17,430 and the Austin clinic was assessed a fine of $22,980. In addition, the Commission found that Stericycle, which provides disposal services for Whole Women's Health, violated Texas law and was subject to a fine of $42,612.[24]

Consequently, contrary to Petitioners' argument that "the record shows no problem with abortion safety in Texas that would signal a need for heightened regulation" (Opening Brief at 42), Operation Rescue's investigations revealed a critical need for improved clinic standards to protect the health and safety of pregnant women in Texas. In contrast to the "demonstrated record of safety" asserted by Petitioners (*Id.* at 2), the evidence revealed a record of disregard for the health and safety of pregnant women in Texas. In fact, Operation Rescue's investigation, and the testimony of physicians discussed *infra* shows abortions being conducted by "unqualified people in unhygienic conditions," which Petitioners' counsel acknowledges poses a threat to women.[25]

Case No. 41833 and Docket No. 2011-1157-MSW-E; Enforcement Case No. 42038.

[24] *Id.*

[25] Center for Reproductive Rights, Briefing Paper: *Safe Abortion: A Public Health Imperative,* 1 (September 2005),

III. TESTIMONY FROM PHYSICIANS CONFIRMED THE URGENT NEED FOR GREATER REGULATION OF ABORTION CLINICS TO PROTECT THE HEALTH AND SAFETY OF PREGNANT WOMEN.

Physicians testifying before the Legislature and in the district court substantiated Operation Rescue's findings that the health and safety of pregnant women was being jeopardized by clinics which did not meet the standards now required under HB2.

In a hearing before the Texas Senate Health & Human Services Committee, Dr. Martha Marie Garza, who has been a practicing obstetrician/gynecologist for 31 years, presented the following case studies as representative of post-abortive patients she has treated:

> Patient #1. A 13 year old Mexican-American teen age girl brought in by her mother, who had taken her for an abortion. They had been told to go to any hospital for any complications, the clinic did not

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http://www.reproductiverights.org/sites/default/files/documents/pub_bp_tk_safe_abortion.pdf.

have a physician or nurse to handle calls afterhours. Upon exam, the young woman was found to be septic: high fever, elevated WBG count tachycardic severe pelvic pain, profuse vaginal bleeding and 2 loops of lacerated intestines coming through the vagina from a hole in the uterus created during the abortion procedure. During surgery several feet of bowel were resected, the uterus and ovaries had to be removed. The 13 year old young woman survived but is now permanently sterile and menopausal.

Patient #2: A 29 year-old Hispanic young woman presented for an annual exam. She related how several years before she had come to San Antonio for an abortion procedure, unbeknownst to her longtime boyfriend and parents. She checked into a hotel after being given the RU 486. She related to me that it was the most dreadful experience of her life...she spent hours in the shower hemorrhaging and bleeding and being afraid that she was going to bleed to death.

The pain was excruciating as she passed the tissue of her pregnancy- so much so, that she passed out. She was told she did not need to be accompanied by anyone- that it was easy! She vomited, cried and bled for hours after flushing the remains down the commode. The relationship with her boyfriend of years ended shortly afterwards...his life has spiraled into alcohol/womanizing and drugs...hers into workaholism and avoidance of any relationships. She was told it was a simple risk- free procedure.

Patient #3: 35 year old Caucasian married woman came in complaining of cramping, bleeding and fever and denying any recent surgical procedures or abortions. Upon exam found to have temperature elevated to 101.6, tachycardia and pelvic exam very tender to palpation. A vaginal exam revealed dark, foul smelling discharge and a cervix dilated to 2 cms. An office sonogram revealed a fetal head, no other fetal parts. Upon further questioning, during pre-op procedures she revealed that

> she had had an abortion procedure the morning before and had been sent home with pain meds, and medications to cause cramping and decrease bleeding. The clinic was not taking after hours calls so she presented to the ER. She was horrified to learn she had been sent home with the baby's head still in the uterus. She asked me how the physician performing the abortion could have missed the head??? I explained to her the parts are numbered and counted during a typical abortion at her gestational age... I could not explain why she was sent home if the count excluded the head. She underwent a D & E and received lV antibiotic treatment. She struggled with night mares, severe depression and suicide attempts. Her marriage ended in divorce.[26]

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[26] Written testimony of Martha Garza, M.D. in support of SB1 (the companion to HB2) before the Senate Health & Human Services Committee, July 8, 2013, http://tlcsenate.granicus.com/MediaPlayer.php?view_id=9&clip_id=495

Dr. Garza further testified that abortion clinics must be held to the same standards of care as other medical facilities in order to protect the health and safety of pregnant women:

> Abortion is a surgical procedure. Therefore, any abortion clinic must be held to the highest level of standards of ambulatory surgical care facilities. Why...simply because women are being treated there, having surgeries We are living in the United States of America , *there is no reason for anything less than the best of medical/surgical care for all women of Texas.* All women deserve an honest informed consent discussion with the surgeon/physician before the procedure where questions may be discussed and answered. As a surgeon, I am responsible for any complication that may occur following a surgical procedure on a patient and am on call 24 hrs. a day or check out to a fellow physician who will handle any patient if I am off for a few days. Any physician has a call service to handle emergency calls- a call

> service that actually answers and puts the patient in contact with a physician. Any physician/surgeon performing abortions must have admitting privileges at a nearby hospital where any type of complication can be handled and consultations may be requested if necessary. For a physician not to offer this to his/her patients *is a serious dereliction of medical responsibility towards his/her patient and an unpardonable breach of trust.*[27]

Dr. Mikeal Love, a board certified obstetrician/gynecologist who is also a member of the American College of Medical Quality, also testified at the Senate hearing. Dr. Love testified that the reforms in SB1 (HB2) were necessary to protect the health and safety of pregnant women.[28]

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27 *Id.* (emphasis added).

28 Written testimony of Mikeal Love, M.D. in support of SB1 (the companion to HB2) before the Senate Health & Human Services Committee, July 8, 2013, http://tlcsenate.granicus.com/MediaPlayer.php?view_id=9&clip_id=495

I support Senate Bill 1 because it raises the standard of care for women who choose to terminate their pregnancies. It raises their level of care to that currently received by all other patients. This is necessary to protect the health and safety of women currently receiving abortions in Texas.

I support raising the standards for abortion facilities to those of ambulatory surgical centers, because part of the standard of care means not only being available to diagnose, but being able to handle significant complications following an abortion. Hemorrhage and incomplete abortion, for example, should be handled in a hospital or ASC setting. *I would only perform a dilation and curettage after a miscarriage in a hospital or ASC setting, because that is the standard of care women deserve. Women receiving elective abortions deserve no less.*

This is not an issue of restricting services but of providing services that meet current standards of care

> *to protect the health and safety of women.*[29]

Physicians similarly testified at the district court about the need for heightened regulations of abortion clinics to protect the health and safety of pregnant women and provide them with the same level of care offered to other patients. Dr. Mayra Jimenez Thompson testified:

> The pregnant uterus with higher risks should only be treated in an ASC or hospital setting where the necessary additional testing or surgery to assess and treat for complications can be safely accomplished. Currently, D&C procedures for non-pregnant women are performed in ASC's or hospital settings due to the need for patient safety. For the most part, traditionally spontaneous incomplete abortions or miscarriages are treated with a suction curettage, in a manner similar to an elective abortion, in a hospital or ASC. In my opinion, abortion procedures should also be performed in an ASC where the

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29 *Id.* (emphasis added).

higher standard of care is required so as to better protect the patient's health and safety.

Elective abortion for the termination of pregnancy is considered no less safe than a diagnostic or therapeutic D&C. It has comparable risks to the suction curettage for retained products of conception in a miscarriage. These are infection, life threatening hemorrhage, which can lead to hysterectomy, and death. Physicians traditionally perform a D&C in an ambulatory surgical center or hospital due to these risks and to maximize patient safety. In an ASC or hospital setting, the patient is monitored by a licensed medical practitioner and nursing staff who are trained to recognize these risks and complications. *To minimize these health risks and perform a D&C in an office setting is, in my opinion, a failure to acknowledge the degree of complexity inherent in this procedure and to accept responsibility for its potential complications – a practice principle stressed to all physicians with basic gynecologic training.*

(Joint Appendix, "JA," at 849-50). "As physicians, we have a duty to provide quality care that maximizes our patients' health and safety." (JA 851).

> Women expect and deserve high quality gynecological/obstetrical care. In my opinion, unregulated abortion care welcomes substandard care and unnecessarily exposes women to serious health risks. On the other hand, when abortion services are closely regulated as through the Act's admitting privileges and ASC requirement, patient protection from adverse outcomes is enhanced and continuity of care is more likely.
>
> Intraoperative safety specifications traditionally used in most operative suites in ASCs or hospitals are emplaced to prevent adverse outcomes. With ASC minimum requirements replacing abortion clinic standards, abortion facilities will then meet the same criteria that other outpatient surgeries must meet rather than having their

> own separate standards. (JA 853-54).

Dr. James Anderson testified that pregnant women seeking abortion, and especially poor women seeking abortion, deserve the same standard of care as is available to other patients seeking outpatient surgery, and in particular those wealthy enough to seek the highest quality of care. (JA 884-85).

> It is inconsistent to promote and advocate for a strong patient-doctor trust relationship in all areas of medicine except in the care of women terminating their pregnancy. If the state continues to allow physicians performing abortions to avoid hospital credentialing and privileging and not be available for follow-up after elective surgical complications and not be required to communicate with other physicians in the transfer of care, then, in my opinion, *the state is allowing this very vulnerable group of pregnant women to be exploited. Pregnant women will assume that the same standards of care will exist in elective abortions as in other outpatient surgical procedures. In*

> *this case, more likely than not, their trust is misplaced.*
>
> Plaintiffs argue that many patients cannot afford to pay for longer distance travel, but I believe that the poverty situation of these patients does not warrant providing them with substandard care. Abortion patients in poverty deserve the same standard of healthcare as those who are wealthier in our society. (JA 908, emphasis added).

Operation Rescue's investigation and the testimony submitted by physicians demonstrated that pregnant women seeking abortions in Texas were in many cases relegated to substandard care despite abortion being legal for more than 40 years. In response, and in keeping with this Court's finding that Texas has a "legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient," *Roe*, 410 U.S. at 150, the Texas Legislature enacted HB2.

The Legislature made particular note of the dangers inherent in substandard abortion clinics, pointing to the case of Kermit Gosnell

as an example of the consequences of such substandard care:

> Compared to ordinary abortion facilities, these surgical centers hire more highly qualified professionals and implement more rigorous quality-assurance programs. Ambulatory surgical centers are checked for compliance with safety requirements and must be equipped with back-up generators and better air filtration systems. Higher standards could prevent the occurrence of a situation in Texas like the one recently exposed in Philadelphia, in which Dr. Kermit Gosnell was convicted of murder after killing babies who were born alive. A patient also died at that substandard clinic. [30]

The Legislature also addressed the issue, raised by Petitioners, of the cost of upgrading substandard facilities vis-à-vis the safety of pregnant women. "While improving standards

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30 Texas House Research Organization, Bill Analysis HB 2, 10 (July 9, 2013) (summary of statement of supporters), http://www.hro.house.state.tx.us/pdf/ba832/HB0002.PDF

comes at a cost, abortion facility operators should be willing to invest some of their profits to ensure the highest level of care for their patients."[31]

The author of HB2 echoed this Court's statement in *Roe* when he said: "Women who choose to have an abortion should receive the same standard of care any other individual in Texas receives, regardless of the surgical procedure performed."[32] "Moving abortion clinics under the guidelines for ambulatory surgical centers will provide Texas women choosing abortion the highest standard of health care. Texas allows no other procedure to opt out of the accepted standard of care."[33] Nor should it, if Texas is to fulfill its obligation to protect the health and safety of all of its residents, particularly vulnerable women seeking abortion.

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31 *Id.*

32 Texas Senate Research Center, Bill Analysis HB2, p. 1 (July 11, 2013), http://www.legis.state.tx.us/billlookup/text.aspx?LEGSESS=832&BILL=HB2.

33 *Id.* at 2.

IV. OPERATION RESCUE'S POST-HB2 RESEARCH SHOWS THAT WAIT TIMES AND COSTS IN TEXAS REMAIN BELOW THE NATIONAL AVERAGE.

Operation Rescue's investigation of abortion clinics in Texas after HB2 was enacted demonstrates that women in Texas still have shorter wait times and lower costs than the national average, even with the closure of clinics that did not meet the new standards.[34] Operation Rescue's investigation refutes Petitioners' "parade of horribles" in which they claim that women will have to wait weeks for abortions if HB2 is upheld by the Court. (Petitioners' Brief, pp. 24-26). In fact, Operation Rescue's survey of abortion clinics, including more than 1,000 calls to clinic workers, revealed that the average wait time for an abortion appointment in Texas is 6.5 days, which is two days under the national average.[35]

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[34] Operation Rescue Special Report: 2015 Abortion Clinic Survey Reveals 81% of Abortion Clinics Closed Since 1991, December 22, 2015, http://www.operationrescue.org/archives/special-report-2015-abortion-clinic-survey-reveals-81 of-abortion-clinics-closed-since-1991/.

[35] *Id.*

Similarly, Operation Rescue's survey showed that the costs of abortions in Texas also remain below the national average.[36] This lays bare Petitioners' warning that HB2's regulations would lead to prohibitive cost increases. (Petitioners' Brief, pp. 17, 32). Operation Rescue found that, post-HB2, surgical abortions cost an average of $578.47 in Texas, which is $16.27 below the national average. Drug-induced abortions in Texas are slightly above the national average, but less expensive than in 17 other states.[37]

Consequently, HB2's reforms aimed at giving women seeking an abortion the same level of care as patients seeking other outpatient procedures have not, as Petitioners warned, increased wait times nor driven up the costs. This further militates in favor of upholding the Fifth Circuit's decision.

CONCLUSION

The Texas Legislature acted to protect the health and safety of pregnant women when it enacted HB2. Far from unduly burdening abortion, the ambulatory surgical center requirement of HB2 equalizes the standard of care for pregnant women seeking abortion. Women should not be relegated to substandard

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36 *Id.*

37 *Id.*

facilities in order to save abortion providers a few dollars. This Court has consistently held that the health and safety of citizens, and especially pregnant women, is a compelling state interest that can justify regulations on abortions.

Operation Rescue's investigation demonstrated the urgent need for improved clinic standards, and the Legislature properly responded to that need by enacting HB2. The Fifth Circuit appropriately upheld the provisions dealing with ambulatory surgical center requirements. Amici respectfully request that this Court uphold the Fifth Circuit's decision.

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